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14th May 2021

Subject: Appeal FAC777/2020 regarding licence CN86929

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

A licence for 630 metres of forest road works at Killerguile, Co. Waterford was issued by the Minister for Agriculture, Food and the Marine on 25th September 2020 with conditions.

Hearing

A hearing of appeal FAC777/2020 was held by the FAC on 23rd April 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, Mr. Iain Douglas, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

DAFM Representatives: Ms. Mary Coogan, Mr. Robert Hamilton

Applicant Representatives: [REDACTED]

Appellant: [REDACTED]

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister for Agriculture, Food and the Marine regarding licence CN86929.

The licence decision pertains to 630 metres of forest road works at Killerguile, Co. Waterford. The application included project design details, road specification, environmental considerations and maps. Construction would be through excavation and the forest to be served is stated to be 26.4 ha and planted in 1998. The application was referred to Waterford County Council and a reply was provided.

The County Council submitted that it did not object but noted that the proposal would be located in Freshwater Pearl Mussel catchment and that it is essential that best practice measures are applied. The proposal was desk and field assessed by the DAFM. The record shows two submissions were made by two members of the public. A Freshwater Pearl Mussel Assessment, Forms A and B, was requested by the DAFM and submitted by the Applicant. This submits that there are no watercourses within the works site and that there is plenty of scope for silt containment. It is submitted that the distance from the works to a live watercourse is approx. 250m and the work site is described as 1.26ha. The DAFM documented an Appropriate Assessment screening of the proposal and identified four sites within 15km and that there was no reason to extend this radius in this case. The identified sites are Comeragh Mountains SAC 001952, Lower River Suir SAC 002137, Mid-Waterford Coast SPA 004193, Nier Valley Woodlands SAC 000668. A consideration of other plans and project in combination is dated 16th September 2020. The record also includes a consideration of the proposal across a range of criteria and a conclusion that the proposal was not required to undergo an EIA process. The approval decision was issued on 25th September 2020 with conditions.

The grounds of appeal FAC777/2020 contend, inter alia, that there has been a breach of Articles 2(1), 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU (The FAC understands this to refer to Directive 2011/92/EU as amended by Directive 2014/52/EU) in that a number of criteria required under Annex III are not taken into account and that the whole project has not been identified or assessed. It is further submitted that the Determination reached by the DAFM is inadequately reasoned and that the application did not contain sufficient information to make the determination and that the details of the application are not an accurate representation of those required under Regulation 6(2) of the Forestry Regulations 2017. It is submitted that the individual Stage 1 AA Natura site conclusions are based on errors of fact and that the in-combination information lacks detail and clarity to enable a definitive position to be reached. It is submitted that mitigation measures to protect the QI (qualifying interests) of a designated site were considered in the screening and that an AA (Appropriate Assessment) is required. It is submitted that there is a high to moderately high risk of landslide within the project area and that this has not been assessed. It is submitted that the licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21 and that the proportion of forest cover is inconsistent in the project documentation. It is submitted that the licence conditions do not provide a system of protection for wild birds under the Birds Directive or animal species listed in IV(a) of the Habitats Directive. It is submitted that consultation and consideration of issues raised by a third party is inadequate.

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act. The Department additionally submits that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, are adequately considered within the current procedures. The Department submits that it complied with these requirements by assessing the information submitted by the applicant and which it considers compliant with the requirements set out in Article 4(4) and Annex IIA, while taking into account of the results of the preliminary verifications or

assessments of the effects on the environment carried out under Birds and Habitats Directives and the Water Framework Directive.

It is submitted that the DAFM carried out a full field inspection of the application on 14/09/20. The proposed 630m of new forest road in the townland of Killerguile, Co. Waterford, runs entirely through a semi-mature coniferous plantation over very dry, flat, peaty podzol with no water to cross in its proposed construction. The road proposal is located ca 2500m away from Lower R. Suir SAC2137 and as there is no hydrological pathway between the road proposal and the SAC there is no possible significant effect on listed qualifying interests and conservation objectives of the SAC, now or in the future. It is submitted that the proposal falls within referral zones employed in DAFM procedures but that these are not mandatory and that given the specific conditions of the site that they were not deemed warranted in this case.

An oral hearing of the appeals was held, of which all parties were notified, and attended by representatives of the DAFM and the Applicant and the Appellant. The DAFM described the processing of the application and the issuing of the licence and restated their written submissions. The DAFM submitted that the site had been field inspected and that the site is very dry and well drained and that there are no drains leading to any watercourse and that there was no risk to water quality or to a Natura 2000 site. The FAC queried the length of the works and the discrepancy between the original application and the licence. The DAFM and the Applicant submitted that the length of the road had not changed but that additional metres are included for grant aid purposes to reflect wider turning areas of the road and that there was no material change in the design. It was submitted that the application had been made by a qualified Engineer, reflected the slope and characteristics of the land and was suitable and appropriate to the site. It was submitted that the proposal area fell just within 3km of a SAC but as it had been established that there was no pathway of effects that it was not considered necessary to refer the application to the NPWS or another prescribed body. It was submitted that additional information had been requested in relation to the Freshwater Pearl Mussel Requirements in line with DAFM procedures but that following field inspection and assessments that it was not deemed necessary to attach any conditions or measures to protect this species and that none were considered as part of the screening. The Appellant elaborated their grounds and submitted that the Freshwater Pearl Mussel form included mitigation measures and that the Application should have proceeded to Appropriate Assessment. The Appellant questioned whether the application had been assessed by an Ecologist and submitted that the DAFM had not followed their procedures. The Applicant described the application and submitted that the road had been specified and designed following desk and field assessment. They submitted that the Biomap submitted with the application showed the proximity to any watercourses and that they were satisfied that the application was not hydrologically connected with any water body and would not impact on any watercourse. It was submitted that the road was sub-threshold for EIA and would not have any significant effects on the environment.

The FAC considered in the first instance the grounds that relate to Environmental Impact Assessment (EIA) Directive and related matters. The FAC considered that the EU EIA Directive sets out in Annex II a list of projects for which member states must determine through thresholds or on a case by case basis

(or both) whether or not EIA is required. The Irish Regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. In this instance the proposal is considered across a number of criteria including the Project Description, Cumulative effect and extent of project, Water, Soil, terrain, slope and other factors. The DAFM also completed a screening for Appropriate Assessment and considered other conservation sites and issues. Answers are provided to the listed questions. At 630 metres the forest road works are considerably sub-threshold for the mandatory submission of an EIA Report. As noted, the forest road would be located in an area of managed forest and is outside of any areas designated for nature conservation.

The road would be situated in the Clodiagh(Portlaw) SC 010 of the Suir Catchment. This is within the Clodiagh Freshwater Pearl Mussel Catchment. A stream flows some 200 metres to the east of the start of the forest road and forms part of the Clodiagh (Portlaw) 040 waterbody which has been assigned a Good status (2013-2018) and Not at Risk (second and third WFD cycles) regarding the objectives of the Water Framework Directive based on data provided by the EPA. A stream flows northerly c.250 metres to the north of the proposed road and this forms part of the Clodiagh (Portlaw) 030 waterbody which has been assigned a Moderate status (2013-2018) and At Risk (Not at risk for second cycle, At risk for third cycle) regarding the objectives of the Water Framework Directive based on data provided by the EPA. This stream flows northerly to join the River Clodiagh west of Clonea and continues into the Lower River Suir SAC. The proposed road would be at a remove of several hundred metres from either watercourse and there is no evidence of a direct hydrological connection. The works would not involve any deep excavation works and would be undertaken in an existing managed forest. The FAC considered that there was no evidence that the proposal as licenced would present a risk to water quality of the achievement of the objectives of the Water Framework Directive. The EIA considerations of the DAFM also document a consideration of this issue.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The proposed forest road is not situated within any European site and is not directly connected with or necessary to the management of the site. As noted, the DAFM recorded a screening for Appropriate Assessment that included plans and projects considered in-combination with the proposed forest road works. The FAC considered the range and type of plans and projects considered in-combination with the proposed road and concluded that they were acceptable. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same four sites within 15km of the proposal. The Lower River Suir SAC lies c. 2.5km at its closest point to the north of the proposed road. This SAC includes a number of terrestrial and aquatic qualifying interests including the Freshwater Pearl Mussel (FPM) (*Margaritifera margaritifera*) which is a species reliant on high water quality and is sensitive to sedimentation. The DAFM recorded that this site

was screened out for Appropriate Assessment for the following reasons and having regard to the design and location of the proposal, the European site and its conservation objectives and pathways,

The absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site.

The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site.

The absence of any aquatic zone within or adjoining the project area.

The absence of any significant relevant watercourse(s) within or adjoining the project area

The Appellant contended that an Appropriate Assessment should have been carried out in relation to this site and that the forms completed by the Applicant in relation to FPM amounted to mitigation measures. The FAC considered the record of the decision and information provided by the NPWS and the EPA in addition to submissions made at the oral hearing. The proposal is for the construction of a forest road in a managed coniferous forest and there is no evidence of the species or habitats related to the SAC being present on site. In addition, there is no evidence of a hydrological connection from the proposed road and any watercourse leading to the SAC with the closest being situated several hundred metres away. The DAFM undertook a field assessment and clarified this point and submitted that the site was dry. The FAC is satisfied that no pathway of effect exists from the proposal to the SAC. Regarding the FPM Form A & B submitted by the Applicant, the FAC noted the submission from the DAFM that this was a procedural design for all sites within such proximity to the SAC but that it was determined that no further assessment or conditions were required. The FAC does not consider that there is any evidence that the submitted forms were relied on in the screening decision and, furthermore, no measures were attached as conditions to the licence in relation to this SAC. The FAC concluded that this submission was a procedural measure and that there was no evidence that measures designed to avoid or reduce effects on a European site were relied upon at the screening for Appropriate Assessment stage.

The Comeragh Mountains SAC lies c.3.6km to the west of the proposal and covers an extensive area and its conservation objectives relate to upland habitats and a species. There is no evidence of these qualifying interests on or adjoining the proposal area and the proposal is not hydrologically connected to the SAC and is at a considerable remove. Nier Valley Woodlands SAC lies over 12 km from the proposal and no pathway of effects is present. Mid-Waterford Coast SPA lies over 13 km to the south of the proposal. The DAFM maintained a record of the screening decision, listing each European site and its qualifying interests, their considerations and the reasons and screening conclusion. Having regard to the record of the decision, the grounds of appeal and submissions at the oral hearing the FAC does not consider that there is any evidence that the DAFM Appropriate Assessment screening contains serious or significant errors and concurs with the conclusions reached. The EIA considerations of the DAFM also record that no Natural Heritage Area or other designated site would be impacted by the proposal.

The DAFM had completed each section of its EIA determination and the responses appeared to the FAC to be largely in keeping with the facts of the matter. The FAC queried the response recorded to the question 'Do the proposed design and construction of the forest road take into account soil, terrain and

slope in a way that mitigates against any environmental damage' and it was submitted that this was an error and that the DAFM had desk and field inspected the application and was satisfied with the design and specification. The FAC did not consider that there was any evidence to contradict this. The Appellant did not submit any evidence that the proposal would have an impact on landslides and the FAC did not consider that there was any evidence that this would occur having regard to the nature of the proposal. As noted, the DAFM considered the proposal across a range of criteria and recorded its reason to conclude that the proposal should not proceed to EIA. The FAC considered that the criteria considered, in addition, to the screening and other parts of the record, were appropriate in this case and that the reasons are recorded and display sufficient reason for the conclusion reached that the proposal should not be subject to the EIA process and are appropriate having regard to the nature, scale and location of the proposal.

Regarding consultation with referral bodies and public submissions. The FAC considered that the application had been referred to the County Council and a response had been provided. The FAC considered that the DAFM had desk and field assessed the application and established an absence of pathway of effects to a watercourse. The DAFM submitted that it had regard to the nature and location of the proposal and considered that there was no requirement to refer the application to other bodies in this case. The FAC considered this to be reasonable having regard to the nature of the proposal and the assessments undertaken by the DAFM. Further, the FAC did not consider that there was any evidence that the DAFM did not have regard to a submission made by the Appellant. This submission was provided to the FAC and contains a number of issues raised regarding obligations on the DAFM and the Applicant and conditions that should be attached to the licence. The DAFM have maintained a record of its considerations and assessments of the proposal and provided further clarification at the oral hearing.

As noted, the application included project design details, road specification, environmental considerations and maps. The FAC considered this information and concluded that there was no reason to conclude in this case that the information provided was inadequate to facilitate the considerations of the DAFM which were supplemented with field inspection. While not raised in the grounds, the FAC had queried the difference in length between the application and the licence and considered the reasons provided at the oral hearing. The FAC is satisfied in this case that the difference is not material and was included for procedural reasons and that interested parties would have been provided with the correct details, if sought. The FAC is satisfied that, having regard to the nature, scale and location of the proposal, that the DAFM conclusion regarding EIA is sufficiently reasoned and the FAC concurs with the conclusion reached and did not consider that any convincing evidence was provided to it that proposal would be likely to have a significant effect on the environment.

In relation to the appellant's stated grounds of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive or animals listed under Annex IV (a) of the Habitats Directive. The FAC had regard to the DAFM record, including the screenings and assessment undertaken. The FAC noted that no details or evidence of the presence of species on the site was provided by the Appellant. The FAC considered that the granting of a felling licence does not exempt the holder from meeting any

legal requirements set out in any other statute. The FAC is not satisfied that an error was made in making the decision in this regard.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence CN86929 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In affirming the decision, the FAC considered that the proposal would be in keeping with Good Forestry Practice and Government policy.

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton/On Behalf of the Forestry Appeals Committee

